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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 Susan Gellos, individually; Taryn Foster,
11 individually,

12 Plaintiff,

13 v.

14 City of Phoenix, a governmental agency;
15 Christopher John Turiano and Jane Doe
16 Turiano, husband and wife; William Gates
17 and Jane Doe Gates, husband and wife;
18 Richard Lee Brunton and Jane Doe
19 Brunton, husband and wife; John and Jane
20 Does 1-X; ABC Corporations I-X; XYZ
21 Partnerships IX,

22 Defendants.

23 Case No. CV-24-01529-PHX-GMS

24 **DEFENDANT RICHARD LEE
25 BRUNTON'S REPLY IN SUPPORT OF
26 MOTION TO SET ASIDE CLERK'S
ENTRY OF DEFAULT**

(Honorable G. Murray Snow)

27 Pursuant to Fed. R. Civ. P. 55(c), Defendant Richard Lee Brunton (“Defendant”),
28 through his counsel, respectfully requests the Court to grant his Motion to Set Aside Clerk’s
Entry of Default (“Defendant’s Motion”) as there is good cause to vacate the entry of default
under Rule 55(c). Fed. R. Civ. P. Plaintiffs’ Response to Defendant’s his Motion to Set Aside
Clerk’s Entry of Default (“Plaintiffs’ Response”) fails to establish any culpable conduct that
led to the entry of default.

27 Plaintiffs do not dispute that Defendant has a meritorious defense or that there is no
28 prejudice to Plaintiffs. Instead, Plaintiffs’ best argument is to accuse Defendant of

1 dishonesty. Not only is there *no basis* for Plaintiffs to make this accusation, but it also would
 2 *not* show culpable conduct as described by the Ninth Circuit Court in *Mesle*. *See United*
 3 *States v. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) Plaintiffs should know this because
 4 they cited *Mesle* in their Response. (*See* Doc. 16 at 3.) The court in *Mesle* held that the
 5 analysis for good cause includes whether the party “engaged in culpable conduct that *led to*
 6 *the default.*” *Id.* (internal quotations omitted). Defendant’s Declaration, which was entirely
 7 honest, was signed and filed *after* the entry of default. Plaintiffs do not cite to any legal
 8 authority to support the assertion that acts occurring after the entry of default factor into the
 9 good cause analysis.

10 Notably, the Summons attached to Plaintiffs’ Response says at the top to contact an
 11 attorney if the recipient does not understand the document. (*See* Doc. 16-1.) This language
 12 would not exist if all lay persons could be expected to understand the document. Further, the
 13 court in *Mesle* took the lack of legal representation into consideration when it reasoned that
 14 “Mesle, a layman working without the aid of an attorney, [was incorrectly held] to the same
 15 standards to which we hold sophisticated parties acting with the benefit of legal
 16 representation.” *Mesle*, 615 F.3d at 1091. Like *Mesle*, Defendant was *not* represented when
 17 his response to the Complaint was due or when default judgment was entered against him.
 18 (*See* Doc. 12-1 at ¶¶ 4-8.) In fact, Plaintiffs acknowledge in their Response that Plaintiffs’
 19 counsel’s conversations were with an attorney representing Defendant’s former employer,
 20 *not with Defendant*. (*See* Doc. 16 at 2.) Plaintiffs have also agreed to *three* extensions for
 21 the City of Phoenix to respond to the Complaint and freely admit they did not extend the
 22 same courtesy to Defendant at his former employer’s counsel’s request. (*See* Docs. 4, 11 and
 23 14.) Plaintiffs now apparently intend to amend the Complaint, which has not been answered
 24 by any party, yet are disputing Defendant’s request to set aside default judgment. (*See* Doc.
 25 14.)

26 It is concerning that Plaintiffs would make such a serious and careless accusation
 27 against Defendant without basis and where it does nothing to establish culpable conduct. It
 28 is nothing more than a red herring allegation that could have serious consequences for

1 Defendant if taken seriously.

2 Plaintiffs are requesting this Court to reward them without having to prove the merits
 3 of their case. The courts have been clear that default judgment “is a *drastic* step appropriate
 4 only in *extreme* circumstances; a case should, whenever, possible, be *decided on the merits.*”
 5 *Mesle*, 615 F.3d at 1091 (citing *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (emphasis
 6 added). Even a conscious choice not to answer is *not sufficient* to establish culpable conduct
 7 under Rule 55(c). *TCB Remarketing LLC v. Metro Auto Auction LLC*, 2021 U.S. Dist.
 8 LEXIS 127549, at * 2 (D. Ariz. July 8, 2021). Defendant did not even make a conscious
 9 decision to avoid answering the Complaint, he was simply ignorant of the legal process.
 10 Ignorance is not culpable conduct under *Mesle*.

11 Due to the foregoing reasons, Plaintiffs’ Response fails to articulate a valid, legal
 12 basis for the Court to deny Defendant’s Motion. Defendant has established that good cause
 13 exists to set aside the Entry of Default pursuant Rule 55(c), Fed. R. Civ. P. and respectfully
 14 requests this Court to set aside the entry of default judgment.

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16 DATED: August 12, 2024

ZELMS ERLICH LENKOV & MACK

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By: *s/ Fatima Badreddine*

19 Robert B. Zelms

20 Fatima Badreddine

21 *Attorneys for Defendants Richard Lee Brunton
 and Jane Doe Brunton*

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, I electronically transmitted the foregoing document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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